88- 1776

NO.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October, 1989 Term

GALA ADKINS; GALA ADKINS, as Administratrix of the Estate of Timothy J. Adkins,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. SHOULD THE FERES DOCTRINE BE OVERTURNED, MODIFIED, OR AT LEAST LIMITED, SO AS TO ALLOW CLAIMS AGAINST THE UNITED STATES OF AMERICA BY AN ACTIVE DUTY SERVICEMAN FOR HIS PERSONAL INJURIES AND DEATH, WHERE HIS PERSONAL INJURIES AND DEATH ARE THE RESULT OF MEDICAL MALPRACTICE OR NEGLIGENCE BY MILITARY MEDICAL OR HEALTH CARE PROVIDERS UNDER DOMESTIC, PEACE-TIME CONDITIONS, AND WHERE THE INJURED SERVICEMAN WAS NOT PERFORMING ANY OF HIS MILITARY DUTIES, AND WAS NOT EVEN ON DUTY AT THE TIME OF HIS INJURY, AND WHERE NONE OF THE TORTFEASORS OR HEALTH CARE PROVIDERS WERE IN THE SERVICEMAN'S CHAIN OF COMMAND?

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REPORTS OF OPINIONS

Neither the Order of the District Court nor the Opinion of the Court of Appeals has been published.

The Order of the District Court was issued by the Honorable Falcon B. Hawkins, United States District Judge for the District of South Carolina, Beaufort Division, on July 11, 1988 in Civil Actions Nos. D:88-0137-1. The Opinion of the Court of Appeals was issued by the United States Court of Appeals for the Fourth Circuit on February 2, 1989, in Appeal No. 88-2573. Both the Order and Opinion have been reproduced in the Appendix contained herein, at pp. 30 - 50.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment which is sought to be reviewed is the Opinion issued by the Fourth Circuit Court of Appeals on February 2, 1989, which affirms the Order issued by United States District Court for the District of South Carolina on July 11, 1988.

The statutory provision believed to confer on this Court jurisdiction to review the judgment by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

FEDERAL TORT CLAIMS ACT:

28 U.S.C. § 2674. Liability of United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title [28 USCS §§ 1346(b) and 2401(b)] the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of any federal agency, members of the military or naval forces of the

United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

On January 21, 1988 Gala Adkins caused three suits to be filed against the United States of America in the United States District Court for the District of South Carolina, Beaufort Division. Each of these suits was filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674. Federal Court jurisdiction is based upon 28 U.S.C. § 1346(b).

Two of these cases -- one for the wrongful death of Timothy J. Adkins and one for the conscious pain and suffering undergone by Timothy J. Adkins prior to his death

-- were commenced by Gala Adkins in her representative capacity as the Personal Representative of Timothy J. Adkins' Estate on behalf of his statutory beneficiaries and heirs at law, being herself as his widow and their two minor sons. The third action was commenced by Gala Adkins individually for her own personal and emotional injuries.

In response to the Complaints, the United States filed a motion to dismiss all three actions pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, asserting that these suits were barred by the doctrine

set forth in Feres v. United States, 340 U.S. 135 (1950). The District Court consolidated the three cases and then granted, albeit reluctantly, the government's motion to dismiss.

Upon appeal of the consolidated cases by Gala Adkins, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal by the District Court.

Gala Adkins is now petitioning this Court to review these decisions pursuant to a writ of certiorari.

B. FACTUAL BACKGROUND

"That an apparently healthy Marine dies after a routine dental procedure gives me great pause."

P.X. Kelley
Commandant of the Marine Corps

The "healthy Marine" to which General Kelley is referring was Sgt. Timothy J. Adkins. While the fact that St. Adkins died from a "routine dental procedure" caused the Commandant to "pause" others were willing to put it much more bluntly. Rear Admiral John H. Fetterman, Jr., Inspector General for the United States Navy, in response to an inquiry by Senator John Glenn, summed it up as follows:"

"Based upon the investigation, I have concluded that the care rendered Sgt. Adkins was substandard. The ultimate responsibility must be borne by a system which allowed non-physician health care providers (i.e., an oral surgeon and a nurse anesthetist) to admit a patient on the serious list and schedule and perform subsequent surgery without a medical evaluation by a credentialed physician. When the patient was placed on the serious list and intubated, the focus of care should have shifted from the dental arena to the medical specialty arena. Sgt. Adkins was transferred to Naval Hospital, Charleston, so that a more sophisticated level of care could be delivered and this did not occur. His primary provider remained an oral surgeon and nurse anesthetist. This is the salient issue in this tragic case."

Sgt. Adkins' death caused the Navy and Marine Corps to launch three separate investigations into the circumstances surrounding his care and treatment. His death was the

example cited in the Journal of the American Bar Association in an article showing the Feres Doctrine under attack in Congress:

> "No matter how poor the care you receive from a military doctor or hospital and no matter what harm you suffer as a result of that care, you must accept whatever compensation the military decides to offer. The current system is unfair....It treats our (military) personnel as second-class citizens."

ABA Journal, pg. 26 (July 1, 1987)(quoting Sen. Jim Sasser, D-Tenn.).

It is, to say the least, not easy to kill someone by pulling their tooth. The sequence of events flowing from the removal of Sgt. Adkins' tooth and culminating in his paralysis, coma and eventual death,

required the malfeasance, misfeasance and nonfeasance of medical health care providers from three separate military installations.

A detailed recitation of the facts of this case is contained in the briefs filed with the Court of Appeals.

ARGUMENT FOR ALLOWANCE OF WRIT

"The King can do no wrong."

Anonymous.

Petitioner respectfully submits that her petition for writ of certiorari should be allowed because, quite frankly, the doctrine set forth in Feres v. United States, 340 U.S. 135 (1950) is unjust, treating the men and women who have dedicated their lives to the service of our country as second-class citizens by denying them access to the judicial system.

Petitioner respectfully submits that her petition for writ of certiorari should be allowed because

the judiciary, the bar and the public need to know how today's Supreme Court stands on the viability and scope of application of the Feres doctrine. That is, will this Court insist upon a blind application of Feres, barring all cases which fall within its original scope, as the majority did in United States v. Johnson, 107 S.Ct. 2063 (1987); or will this Court allow each case to be examined on its own merits, barring only those civil suits which would jeopardize military interests, as it did in Shearer v. United States, 105 S.Ct. 3039 (1985).

Tort claims against the United

States are governed by the Federal Tort Claims Act, 28 U.S.C. § 2674 (1982). This act was passed by Congress in 1946 in recognition of the unfair and unjust consequences of the common law doctrine of Sovereign Immunity which insulated the United States from tort liability. The Act provides that the United States is liable for damages in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1982). It is important to note that the act contains no express exclusion or limitation on the right of military personnel to bring such claims.

The United States Supreme Court, however, has judicially amended the Federal Tort Claims Act to provide an exclusion or limitation upon the rights of military personnel to bring a claim under the Act. In Brooks v. United States, 337 U.S. 49 (1949) the Supreme Court held that servicemen may recover under the Tort Claims Act on claims which have no relationship to their military service. Shortly thereafter, in Feres v. United States, supra, the Court held that servicemen may not recover under the Act on claims which arise out of or in the course of activity incident to their

military service. This exclusion has commonly become known as the "Feres Doctrine."

Three rationales are commonly advanced in support of this judicial amendment to the Federal Tort Claims Act. These rationales are as follows:

"(1) the distinctively federal nature of the relationship between the government and members of its armed forces; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure."Atkinson v. United States, 804 F.2d 561, 563, (9th Cir. 1986), citing Stencel Aero

Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1977).

The first two rationals gradually fell into disfavor, with the courts placing more and more emphasis upon the third rational as the best justification for the Feres Doctrine. See United States v. Muniz, 374 U.S. 150, 162 (1963). Finally, in United States v. Shearer, 473 U.S. 59, (1985), the Supreme Court expressly acknowledged that the first two rationals were "no longer controlling." Id. at 58, fn4. In Shearer the court emphasized that the Feres Doctrine was best justified by the "effects of the maintenance of such suits on

discipline, and the extreme results that might obtain if suits under the tort claims act were allowed for negligent orders given or negligent acts committed in the course of military duty." Id. at 57. The court stated that "each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." Id. The court noted that in examining each case the court should look to see "whether the suit requires the civilian court to second guess military decisions, or whether the suit "calls into question basic choices about the discipline, supervision and control of a

serviceman." Id. 57-58.

After Shearer, it appeared that the Supreme Court was limiting the application of the Feres Doctrine. See, Stanley v. United States, 786 F2d 1490, 1499 (11th Cir. 1986) (Shearer rejects "bright line test" and requires that each case be analyzed for applicability of the Feres Doctrine.

In particular, the Ninth Circuit Court of Appeals, in Atkinson v. United States, 804 F2d 561 (9th Cir. 1986) interpreted Shearer to require the courts to take a case by case, rather than per se, approach to claims of immunity by the United States based on the

Feres Doctrine. The Ninth Circuit accordingly held that "the Feres Doctrine bars a suit only where a civilian court would be called upon to second guess military decisions or where the plaintiff's admitted activities are of the sort that would directly implicate the need to safeguard military discipline." 804 F2d at 563.

The United States Supreme Court, however, in USA v. Johnson, 107 S.Ct 2063 (1987) back tracked from its decision in Shearer and, over a strong dissent, reaffirmed the per se validity of the Feres Doctrine and its prohibition on tort suits brought by service members

against the United States for injuries that arise out of or are in the course of activity incident to service.

107 S.Ct. 2066-67.

The Ninth Circuit reacted to Johnson v. USA, by rehearing Atkinson v. USA. The Ninth Circuit found that "Johnson appears to breathe new light into the first two Feres rationals, which until that time had been largely discredited and abandoned." Atkinson v. USA, 825 F2d 202, 205-06 (9th Cir. 1987). The Ninth Circuit accordingly applied the blanket bar of the Feres Doctrine to the case before it. 206 F2d at 825.

USA v. Johnson was a 5-4 decision. The majority opinion confirmed that Feres bars "all suits on behalf of service members against the government based upon service-related injuries." 107 S.Ct. at 2067. This majority opinion was written Justice Powell. The dissenting opinion, written by Justice Scalia and joined in by Justices Brennan, Marshall and Stevens, bluntly states that Feres was "wrongly decided and hardily deserves the "widespread, almost universal criticism" it has received." 107 S.Ct. at 2074.

Justice Powell has now retired. He leaves behind him eight justices

who are evenly split on the viability of Feres. Justice Powell's successor, and the man who will be the tie breaker, is Justice Kennedy. Justice Kennedy comes to the Supreme Court after serving twelve years on the Ninth Circuit Court of Appeals. The Ninth Circuit has been one of the leaders in attempting to limit the unjust application of the Feres Doctrine. As already noted, in Atkinson v. USA, 804 F2d 561, 564-65 (9th Cir. 1986) the court held that the medical malpractice action before it was not barred by Feres, since it did not involve military decisions or discipline. The Ninth Circuit

had also earlier held "where there is no relevant relationship between the service members' behavior and the military interest that might be jeopardized by civil suits, the Feres Doctrine cannot bar recovery." Johnson v. USA, 704 F2d 1431, 1440 (9th Cir. 1983).

CONCLUSION

The facts of this case are horrifying. A perfectly healthy young Marine was killed as a result of a routine dental check. Petitioner respectfully submits that this case presents an appropriate vehicle to overrule, or limit the application of, the Feres Doctrine. In this regard, it should be noted that this case involves dental and medical care identical to that found in the civilian setting, rendered by military medical and health care providers under domestic, peace-time conditions. Further, the United States has admitted, pursuant to

Requests for Admissions, that Sgt. Adkins was not performing any of his military duties at any of the times referred to in the complaint; that Sgt. Adkins was not in an "on-duty" status at any of the times referred to in the complaint; that Sgt. Adkins was on sick leave at all times referred to in the complaint; and that none of the health care providers referred to in the Complaint were in Sgt. Adkins' chain of command. App., pp. 66-71 (Requests Nos. 8-11). In short, there is no reason, in justice or fairness, why the claims for the wrongful death of and conscious pain and suffering of Sgt. Adkins should

be barred by the Feres Doctrine. Petitioner accordingly respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

MOSS, DORE, KUHN & MCINTYRE, P.A.

By: _____
H. Fred Kuhn, Jr.
Attorneys for the Plaintiff

April 28th, 1989

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

GALA ADKINS, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	) C.A. #D:88-0135-1)(Loss of Consortium)
GALA ADKINS, AS Administratrix of the Estate of TIMOTHY J. ADKINS, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)C.A. #D:88-013601)(Pain & Suffering)

GALA ADKINS, As Administratrix of the Estate of TIMOTHY J. ADKINS,	)C.A. #D:88-0137-1)(Wrongful Death)
Plaintiff,	
vs.	
UNITED STATES OF AMERICA,	
Defendant.	

ORDER

These three consolidated cases are before the court on the government's motion to dismiss and the plaintiff's motion to compel responses to requests for admission. Since the court finds that the government's motion must be granted, however, the plaintiff's motion to compel is moot.

In June 1985, Timothy Adkins was a Sergeant in the United States Marine Corps. As a result of having his wisdom

tooth pulled by personnel at the Branch Dental Clinic of the Marine Corps Air Station in Beaufort, South Carolina, Seargeant Adkins died on August 8, 1985. The plaintiff alleges in the complaints that the technician who assisted in the extraction of the tooth failed to realize that the autoclave which sterilized the instruments used in Sergeant Adkins' surgery was not working properly. After the extraction, Sergeant Adkins developed an infection which was initially treated with penicillin. The penicillin proved ineffective, and, after several return trips to the Clinic, Sergeant Adkins was hospitalized. The decision was made to transport the Sergeant from the Beaufort

Naval Hospital to the Charleston (S.C.) Naval Hospital. Because the Sergeant twice entered respiratory arrest, a nasoendotracheal tube was inserted to assist his breathing prior to transfer.

After arriving at the Charleston Naval Hospital, the Sergeant was placed in intensive care, and the decision was made to drain an abscess in his neck. Prior to this procedure, an attendant at the hospital decided to change the nasoendotracheal tube. While attempting to insert the new tube, the attendant punctured the abscess. Sergeant Adkins aspirated the discharge and, as a result, developed inoperative pulmonary edema, which resulted in adult respiratorty distress syndrome from which the Sergeant died on August 8,

1985. Sergeant Adkins was twenty-six (26) years old.

These three consolidated cases were filed by Sergeant Adkins' wife in her personal capacity and in her capacity as Administratrix of Sergeant Adkins' estate. The government has moved to dismiss the complaints, and, perhaps the most incredible aspect of this whole scenario is that the motion must be granted.

In 1950, the United States Supreme Court decided three consolidated cases in Feres v. United States, 340 U.S. 135 (1950), and held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the

course of activity incident to service." Id. at 146. It is clear from the facts of the three cases decided in Feres that the Court meant to preclude suits brought to recover for injuries to servicemen which injuries resulted from the negligent acts of other servicemen.

This doctrine, now commonly known as the Feres doctrine, has received much deserved criticism, but the Supreme Court recently affirmed its vitality in United States v. Johnson, 107 S.Ct. 2063 (1987). The Court affirmed the application of the Feres doctrine to the facts of the case by a five-to-four vote, but Justice Scalia issued a scathing dissent criticizing the apparent inequity in the rule. Recognizing the injustice wrought by the

Court's interpretation of the Federal Tort Claims Act in Feres, Justice Scalia observed:

> Had Lieutenant Commander Johnson [the plaintiff's decendent] been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss, but because Johnson devoted his life to serving his country's armed forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and is not.

Id. at 2075-76.

Justice Scalia's observations are equally applicable to the case at bar.

Had Sergeant Adkins sought relief from a private dentist, his family would at least have the comfort of recovering their total loss insofar as money could bring about that result. However, since Sergeant Adkins chose to serve in the United States Marines, not only his wife suffered the loss of her twenty-six year old husband, but she must also shoulder the financial burdens which his death has placed on her.

If this court wrote on a clean slate, the result we reach today would undoubtedly be different. It is difficult to imagine a case less ripe for dismissal than one in which the Plaintiff's decedent died after having a tooth pulled; but Feres and its progeny tie the court's hands. It is clear that

the two cases brought by Mrs. Adkins in her capacity as administratrix of the estate of Sergeant Adkins must be dismissed because they are barred by the Feres doctrine.

Plaintiff points out that the decision in Johnson occurred prior to the retirement of Justice Powell who voted with the majority, and, in effect, asks the court to anticipate a different result when the Feres doctrine is again reviewed by the Court with Justice Kennedy participating rather than Justice Powell. While the invitation to anticipate a rejection of the Feres doctrine is tempting, the Supreme Court has made clear that the lower courts have a duty to apply the

law as interpreted by the Supreme Court, not to change it. Jaffree v. Board of School Com'rs of Mobile County, 459 U.S. 1314, 1316 (1983), Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

In the case brought by Ms. Adkins in her personal capacity, the plaintiff tries to fit within an exeption to Feres by alleging an independent tort. She claims that the defendant's conduct was so outrageous as to constitute intentional infliction of emotional distress. Ms. Adkins also alleges that she contemporaneously witnessed the negligent acts toward her husband and thereby suffered a direct injury as a result of the defendant's negligence.

The case law applying the Feres doctrine makes clear that Ms. Adkins' claim must also be dismissed. In Kohn v. United States, 680 F.2d 922 (2d Cir. 1982), the court allowed the parents of a deceased serviceman to maintain a cause of action for intentional infliction of emotional distress. In that case, the conduct which the court found outrageous was conduct which occurred after the death of the plaintiff's decedent. The court held that "the Feres doctrine does not preclude recovery for independant, post-service negligent acts by the military, whether the plaintiff be a serviceman or a civilian." Id. at 926.

In Lombard v. United States, 69[illegible]

F.2d 215 (D.C. CIr. 1982), cert. denied, 462 U.S. 1118 (1983), the court was faced with a case brought by the birth-defected children of a serviceman who was exposed to radiation while on duty in the military. In finding the case barred by the Feres doctrine, the court concluded that Feres barred all claims which have their genesis in an injury to a serviceman incident to military service.

Finally, in West v. United States, 729 F.2d 1120 (7th Cir. 1984), cert. denied, 472 U.S. 1013 (1985), the Seventh Circuit Court of Appeals cited Lombard with approval and declined to dismiss the claims of the birth-defected children of a serviceman whose blood type was erroneously determined at his

pre-induction physical. The court did not rely on the fact that the blood typing occurred prior to the father's actual induction into the military. Rather, the court concluded that the father was not injured by the erroneous blood typing, and that the claims of the children, therefore, did not have their genesis in an injury to a serviceman incident to military service.

In the case at the bar, it is clear, despite artful pleading by the plaintiff, that her claims do have their genesis in the injury to Sergeant Adkins incident to his military service. Therefore, the government's motion to dismiss must also be granted with respect to Civil Action #D:88-0135-1.

It is, therefore,

ORDRED, that the government's motion to dismiss all three consolidated cases be, and the same is hereby granted, and the within cases are hereby dismissed.

AND IT IS SO ORDERED.

/s/ Falcon B. Hawkins
FALCON B. HAWKINS
United States District Judge

Charleston, South Carolina
July 11th, 1988.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 88-2573

Gala Adkins: Gala Adkins, as Administratrix of the Estate of Timothy J. Adkins,

Plaintiffs-Appellant,

versus

United States of America,

Defendant-Appellee,

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Falcon B. Hawkins, District Court Judge. (CA-88-135)

Argued: January 11, 1989
Decided: February 2, 1989

Before RUSSELL, Circuit Judge, BUTZNER, Senior Circuit Judge and HENDERSON, United States District Judge for the District of South Carolina, sitting by designation.

Harold Fred Kuhn, Jr. (Moss, Dore, Kuhn & McIntyre, P.A., on brief) for Appellant. John Harris Douglas, Assistant United States Attorney (Vinton D. Lide, United States Attorney on brief for Appellee.

PER CURIAM:

This consolidated appeal arose from three actions brought by the spouse of a deceased serviceman whose death allegedly resulted from improper treatment given by Navy dental and medical personnel. The district court reluctantly dismissed the claims under Fed. R. Civ. P. 12(b) because the claims were barred under the Feres doctrine. Accordingly, we affirm.

In Feres v. United States, 340 U.S. 135, 146 (1950), the United States Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries

arise out of or are in the course of activity incident to service." Although the Supreme Court has indicated at times a willingness to part with the per se application of this rule, see United States v. Shearer, 473 U.S. 52, 57 (1985) ("The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases."), the Court recently affirmed such a per se approach in United States v. Johnson, 481 U.S. 681 (1987). This court is not free to ignore a recent and clear affirmation of the Feres doctrine,

and therefore, must hold the plaintiff's wrongful death and survivorship actions barred.

The appellant also argues that, if this court refuses to overturn the Feres doctrine, then it should hold the doctrine inapplicable to claims for outrage or for emotional distress to bystanders. The appellant argues that Feres bars only actions derivative of a serviceman's injury, and that the appellant's emotional distress is not derivative. This argument is not persuasive.

Feres' broad proscription bars suits seeking redress for injuries derivative of harm done to a

serviceman. Hinckie v. United States, 715 F.2d 96 (3rd Cir. 1983), cert. denied, 465 U.S. 1053 (1984); Scales v. United States, 685 U.S. 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960). Emotional distress suffered by an injured serviceman's family as a result of the serviceman's condition derives from the serviceman's injury. Lombard v. United States, 960 F.2d 215 (D.C. Cir. 1982) (wife's emotional distress derivative), cert. denied, 462 U.S.

1118 (1983); DeFont v. United States, 453 F.2d 1239 (1st Cir.) (spouse's bystander action for mental anguish and loss of consortium derivative), cert. denied, 407 U.S. 910 (1972). As the D.C. Circuit Court of Appeals observed in Lombard, an emotional injury to a spouse resulting from a physical injury to a serviceman, "while it has some incidence of being 'independent' in nature, basically ... has its genesis and relies upon 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to military] service.'" Lombard, 690 F.2d at 226. Because

the appellant's outrage and bystander claims derive from the serviceman's injury, the district court's dismissal of these causes of action is affirmed.

AFFIRMED